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No. 89-23

In The

Supreme Court of the United States

October Term, 1988

DR. WAYNE SMITH,

Petitioner,

v.

CLEBURNE COUNTY HOSPITAL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals correctly applied the proper standard of review in reversing the District Court Opinion that Dr. Smith's Hospital staff privileges were constructively revoked in retaliation for exercise of First Amendment rights, where the appellate court did not specifically mention that it applied the clearly erroneous standard to factual findings and where the court held as a matter of law that Dr. Smith's speech activities were beyond the scope of constitutional protection.

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STATEMENT OF THE CASE

Dr. Wayne Smith, a general practice physician, first submitted written application and was accepted on the medical staff of Cleburne County Hospital (Hospital) in 1968. Hospital by-laws provided that the medical staff each year was to submit recommendations to the Hospital Board of Governors as to which physicians, upon submission of written application, should be accepted onto or remain on the medical staff. Membership on the Hospital medical staff, while permitting the physician to admit patients to the Hospital, carried certain responsibilities such as attending monthly staff meetings and providing rotating coverage for the Hospital emergency room.

By the mid 1970's, Dr. Smith had become dissatisfied with the level of care provided by the Hospital and voiced numerous complaints about the way the Hospital was operated by both the administration and the medical and nursing staff. In July 1986, Dr. Smith informed the Hospital Administrator of his intent to resign from the staff and began so informing his patients as well. Dr. Smith drastically reduced his admissions to the Hospital. On November 22, 1976, Dr. Smith wrote the Hospital Board of Governors requesting an investigation of the Hospital and stated he should no longer remain on the staff if such investigation did not bear out his complaints and instead showed him to be the problem. (PX 76) On that same date, Dr. Smith distributed an open letter to his patients complaining of patient care and the operation of the Hospital and indicating his intent to quit using the Hospital and to resign from the staff. (PX 75) On December 20, 1976, the Hospital Board, largely in response to

Dr. Smith's criticisms and public debate, made arrangements for the Arkansas Department of Health to undertake an inspection and evaluation of the Hospital facilities and quality of care. Shortly thereafter, members of the medical staff took out an advertisement in the local newspaper supporting the Hospital and quality of care it provided. Debate concerning the Hospital and Dr. Smith's complaints received wide press coverage and discussion at public forums. During this time period, Dr. Smith was also issuing some rather biting personal attacks against the Hospital Administrator, Board of Governors, and fellow members of the medical staff, both publicly and privately. At the January 3, 1977 medical staff meeting, Dr. Smith indicated he would not be satisfied with an Arkansas Department of Health investigation and that if such investigation found the Hospital provided adequate care, he would be unable to live with his conscience and would resign. (PX 100) The Arkansas Department of Health completed its investigation and submitted the results on February 1, 1977. (PX 108,109) The report noted some deficiencies; Dr. Smith felt the report indicated the Hospital was providing poor care; other physicians felt it was a basically good report. Dr. Smith announced his candidacy for county judge on February 9, 1977 with a platform critical of the Hospital administration and care provided.

At the February 22, 1977 medical staff meeting, a meeting Dr. Smith chose not to attend, the medical staff passed a resolution *recommending* to the Hospital Board of Governors that the Board *temporarily suspend* Dr. Smith's staff privileges since the medical staff felt the Arkansas Department of Health investigation did not support

Smith's claims of improper patient care. (That resolution, PX 126, is attached as Appendix A.) Dr. Smith responded by writing the Hospital Administrator on February 25, 1977 that in light of the medical staff allegations, he had "no choice but to cease hospital activity" until the matter was resolved. (PX 128) The Administrator responded by letter indicating he understood Dr. Smith's letter to be a letter of resignation which he would pass on to the Board. (PX 134) Dr. Smith replied with a letter that same day indicating he had not resigned from the active medical staff. (PX 135) Consequently on March 17, 1977, the Administrator wrote Dr. Smith that the Board considered him to be an active member of the medical staff and reminded him of his obligations to retain that privilege, including emergency room coverage. (PX 138) Dr. Smith responded by letter dated March 18, 1977 that, on advice of counsel, he would not be "actively participating in hospital activities for some time." (PX 139) On March 24, 1977, the Joint Committee which had been appointed by the Board of Governors to look into the controversy acted on the medical staff recommendation by requesting the Professional Relations Committee of the Arkansas Medical Society to investigate the situation. That Arkansas Medical Society committee investigated for a period of time and determined the controversy was a personality conflict and the committee ceased its investigation.

Dr. Smith did not accept further coverage assignments or attend further staff meetings following the medical staff recommendation. After Dr. Smith missed more than four staff meetings, he was taken off the medical staff in accordance with staff by-laws. Dr. Smith was

provided forms necessary to complete his yearly application for renewed staff privileges which were due back by August 20, 1977. All doctors desiring staff privileges were required each year to reapply. Dr. Smith failed to respond, nor did he participate in further Hospital activities.

The next formal activity was a hearing by a Joint Executive Committee of the Hospital in October 1981 at the direction of the District Court on the issue of whether Dr. Smith should be granted renewed staff privileges. The committee heard testimony and determined Dr. Smith should not be granted privileges based on its belief that Dr. Smith's return would be detrimental to the Hospital and the care it provided. The Board accepted the recommendation that Dr. Smith's staff privileges not be renewed.

Trial of this matter was bifurcated by the District Court. Upon completion of the liability phase, the court concluded Dr. Smith's privileges were constructively revoked in retaliation for his exercise of First Amendment rights by the medical staff action in February 1977 and the Board action in November 1981. Following the remedy phase of trial, Dr. Smith was awarded compensatory damages of $15,000.00 for mental anguish, and punitive damages were assessed against individual defendants. Additionally, reinstatement was ordered upon a showing that Dr. Smith met objective criteria for participating on the medical staff. The Eighth Circuit Court of Appeals reversed the liability decision, holding that Dr. Smith voluntarily resigned from the medical staff and that his speech fell outside the scope of constitutionally protected activity.

REASON FOR DENYING THE WRIT

The Eighth Circuit Court of Appeals applied the proper standard of review in reversing the Opinion of the District Court that Dr. Smith's staff privileges were constructively revoked in retaliation for exercise of First Amendment rights. On the issue of constructive revocation, the Court of Appeals, without specifically citing Rule 52 of the Federal Rules of Civil Procedure or the clearly erroneous standard, made it abundantly clear that from a review of the record, it was convinced that a mistake had been made by the District Court in its factual findings and conclusions. The appellate court referred to specific factual matters, either ignored or not given appropriate consideration by the District Court, which made it unmistakably clear that Dr. Smith voluntarily resigned from the medical staff of Cleburne County Hospital and, likewise, the absence of evidence that the medical staff, Hospital Board, or other Hospital representatives deliberately made conditions so intolerable that Dr. Smith could not stay. The appellate court also specifically reversed the District Court as to its First Amendment findings. The Court of Appeals noted that the inquiry as to whether speech is constitutionally protected is a question of law (not subject to the clearly erroneous standard) and held that the District Court failed to take into account that Dr. Smith's complaints evolved into vindictive personal attacks designed to disrupt the functioning of the Hospital rather than comments on matters of public concern. The Court of Appeals held that the District Court erred as a matter of law in automatically affording Dr. Smith's complaints the highest level of First Amendment protection just because they ostensibly concerned

Similarly, under *Pickering* and *Connick* the balancing between the employee's interest in commenting upon matters of public concern and the State's interest in promoting the efficiency of its services imposes upon the appellate court an obligation to exercise its independent judgment. *Connick*, 461 U.S. at 150, n. 10. Again, the Eighth Circuit recognized and applied the proper standard of review in conducting the *Pickering* balancing test. (App. 18-19.)

Finally, the Eighth Circuit's conclusion that Smith's speech was not entitled to First Amendment protection does present any conflict among the circuit courts of appeal. The Eighth Circuit's decision is consistent with the only other circuit court opinion to address a similar issue. *See Davis v. West Community Hospital*, 755 F.2d 455 (5th Cir. 1985) (Physician's complaints, including allegations of poor patient care by physicians and alleged malfeasance by board of directors, held to involve matters of only personal interest as employee, rather than matters of public concern as citizen.)

B. The Court of Appeals implicitly applied the clearly erroneous rule to the constructive discharge issue in finding that there was "no evidence" to support the district court's conclusion.

As set forth above, the Eighth Circuit applied the correct standard of review in reversing the district court's decision that Smith's speech was entitled to First Amendment protection, which obviates the need to reach the

issue posed in the petition. However, even if the merits of petitioner's argument are examined, (and assuming *arguendo* that a finding of constructive discharge is a finding of fact subject to the clearly erroneous standard[3],) the petition should nonetheless be denied. The Eighth Circuit did not usurp the district court's function as fact finder, nor did it simply pronounce fact findings at "polar

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[3] The petition assumes without citation of authority that the district court's finding of constructive revocation is a factual finding. Solely for the limited purpose of responding to the petition, Respondents address the merits of the petition under that assumption. However, this Court has never held that a finding of constructive discharge is a factual finding which may be overturned on appeal only if clearly erroneous. At least two circuit courts of appeal have stated that constructive discharge is a mixed question of law and fact, which broadens the scope of appellate review, *see Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987); *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1538 (11th Cir. 1987); while other circuits have held that a constructive discharge is reviewable as a finding of fact. *E.g., Thorne v. City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986). One circuit court has expressed the desire to "avoid the Serbonian bog which appears to encircle the inquiry whether constructive discharge poses solely a question of fact or a mixed question of fact and law." *Junior v. Texaco, Inc.*, 688 F.2d 377, 379 (5th Cir. 1982). In the absence of a controlling opinion establishing that a constructive discharge finding is purely a finding of fact, Supreme Court review of the present case would necessarily require a determination of this additional unresolved question. If it should be held to be a mixed question of law and fact, there is substantial authority that the finding is independently reviewable by the appellate court. *See Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19 (1982).

opposite" from the trial court, as Smith suggests.[4] (Pet. 8.) The Eighth Circuit's opinion clearly reflects that the Court considered the district court's finding of constructive revocation to be – at a minimum – clearly erroneous.

Although the Eighth Circuit did not make specific mention of Fed.R.Civ.P. 52(a), the "clearly erroneous" standard, or *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1984), when the Eighth Circuit's opinion is considered in context and in light of the record, the unequivocal, forceful language employed in its unanimous decision leaves no doubt that the Court of Appeals concluded that the district court's finding of constructive discharge was clearly erroneous. To require that the Eighth Circuit reconsider its decision under *Anderson v. City of Bessemer* would be a hollow and futile elevation of form over substance.

The seminal principle on the "clearly erroneous" standard is that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

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[4] Contrary, to Smith's assertions, the Eighth Circuit did not engage in wholesale revisions to the subsidiary findings of fact made by the district court. A comparison of the two opinions reveals a substantial amount of similarity and overlap in the discussion of facts. Indeed, Smith does not attack any specific statements of fact contained in the Eighth Circuit's opinion. The court's differing views involve the application of law to the facts.

The Eighth Circuit's opinion makes clear that their review of the record left the Court with the definite and firm conviction that a mistake had been committed. In reversing the finding of constructive discharge, the Eighth Circuit stated:

> A constructive discharge would occur only if the Hospital rendered Smith's working conditions intolerable in order to force him to quit. [Citation omitted] *There is nothing in the record which would suggest that the Hospital tried to create intolerable conditions in order to force Smith to quit.* In fact, it is abundantly clear that the Hospital and its staff tried to accommodate Smith as much as possible as demonstrated in their continued efforts to enable Smith to maintain his privileges. (Emphasis added.)

(App. 13.) In concluding that there is "nothing in the record" to "suggest" that the defendants sought to render Smith's working conditions intolerable, the Eighth Circuit has more than satisfied the safeguards embodied in the "clearly erroneous" rule. Since there is no evidence to support the district court's finding of constructive discharge, it necessarily follows that the trial court's conclusion was clearly erroneous. If a finding can be clearly erroneous when there is evidence to support it, *United States Gypsum*, 333 U.S. at 395, it necessarily follows *a fortiori* that a finding is clearly erroneous if there is no evidence to support it.

Similarly, for appellate court deference to factual findings, *Anderson v. City of Bessemer* requires that the district court's account of the evidence be plausible in light of the record in its entirety and that there be two permissible views of the evidence. 470 U.S. at 573-4.

Thus, by implication, if the findings drawn by the district court are *not* plausible and if the appellate court concludes there is only *one* permissible view of the evidence, then the district court's findings are clearly erroneous. A fair reading of the Eighth Circuit's unanimous opinion leads to the inescapable conclusion that the appellate court simply found the district court's conclusion of constructive discharge implausible in light of Smith's voluntary withdrawal and the staff's continued efforts to enable Smith to maintain his privileges. (App. 13.)

In concluding that Smith's privileges were constructively revoked, the district court failed to detail the evidentiary support for its finding.[5] (App. 41-42.) Where, as here, a district court fails to enunciate the basic evidentiary support for its findings, a court of appeals cannot say that the finding is plausible and thus not clearly erroneous. *Lopez v. Current Director of Texas Economic Development Comm.*, 807 F.2d 430, 434 n. 3 (5th Cir. 1987).

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[5] The petition erroneously asserts that in support of its liability finding of constructive revocation of staff privileges, the district court made specific findings of fact that the "medical staff . . . made conditions intolerable for Smith and *specifically intended* to make conditions intolerable for Smith, that his subsequent withdrawal was therefore involuntary. . . ." (Emphasis in original.) (Pet. 12.) The only passage of the liability opinion which discusses the finding of constructive revocation makes a conclusory finding that the withdrawal was involuntary. (App. 41-42.) The district court opinion made no factual findings in its liability opinion that Smith's conditions were intolerable nor did it detail any evidentiary support of its conclusion of constructive revocation.

Although the district court made no specific credibility findings, Smith suggests that the constructive discharge finding was implicitly based upon credibility determinations. (Pet. 13). Even if that were true, the Eighth Circuit's reversal on this record would not be prohibited by the "clearly erroneous" standard. Where the story itself is so intentionally inconsistent or implausible on its face that a reasonable factfinder would not credit it, the court of appeals is permitted to find clear error even if a finding purportedly is based on an express credibility determination. *Anderson*, 470 U.S. at 564. Here, the Eighth Circuit conclusion that there was "nothing in the record" to support a finding of constructive revocation and that it was "abundantly clear" that the Hospital and its staff tried to accommodate Smith in their continued efforts to enable him to maintain his privileges reflects the appellate court's conclusion that Smith's testimony that he was forced to resign from the staff is simply implausible and unworthy of belief, notwithstanding any alleged implicit credibility determinations. (App. 13.)

CONCLUSION

In seeking certiorari, Smith advocates a purely mechanical approach to findings of fact and Rule 52(a), which this Court has eschewed, especially in cases under the First Amendment. *See Bose*, 466 U.S. at 499, 501 n. 17. Respondent Board of Governors urges the Court to deny the petition and decline Smith's invitation that the Court deviate from the traditional scope of review in First Amendment cases. If adopted, the petitioner's approach would weaken, if not destroy, the firmly established duty

of an appellate court to make an independent review in First Amendment cases. The Eighth Circuit applied the correct standard of review to decide as a matter of law whether Smith's speech was entitled to First Amendment protection and to resolve the balancing test under *Pickering* and *Connick*. These unassailable holdings are dispositive of the petition.

The Eighth Circuit's opinion with regard to the finding of constructive discharge leaves no doubt that the appellate court was left with the firm and definite conviction that a mistake had been committed. Any oversight by the appellate court in not specifically reciting the "clearly erroneous" standard is rendered harmless by the dispositive ruling that Smith's speech was not protected by the First Amendment and by the Eighth Circuit's express finding that there is "no evidence" to support a finding of constructive revocation.

Accordingly, Respondent Board of Governors respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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